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SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

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N. Seguin

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA

Plaintiff,

vs.

STEVEN CARROLL DEMOCKER,

Defendant.

No. P1300CR20081339

Division 6

**REPLY IN SUPPORT OF
MOTION TO REQUIRE THE
STATE TO ELECT WHICH
PRONG OF THE (f)(6)
AGGRAVATOR IT IS
ALLEGING IN ADVANCE OF
OCTOBER 20, 2009
EVIDENTIARY HEARING ON
PROBABLE CAUSE AND
SUPPLEMENTAL
MEMORANDUM FOR *CHRONIS*
HEARING ON (f)(6)**

(Oral Argument and Evidentiary
Hearing Requested)

The State's Response asserts that it is alleging both the cruel and depraved prongs under the A.R.S. 13-751(f) (6) aggravating circumstance. Counsel request that this Court therefore prohibit the State from offering any evidence or argument to the jury that the offense was committed in a heinous manner. Counsel also request, based

1 on the State's Response, that this Court require, in the event that an aggravation phase is
2 held, that the jury make separate findings as to each of the two prongs the State is
3 alleging under (f) (6). *State v. Anderson*, 210 Ariz. 327, 111 P.3d 369 (2005).¹ As the
4 Arizona Supreme Court noted in *Anderson*, this will avoid a potentially non-unanimous
5 jury verdict. *Id.*

6 However, these issues may be avoided because this Court should dismiss the (f)
7 (6) aggravator for lack of probable cause. The State's Response demonstrates that it
8 falls far short of the required probable cause showing for this aggravating circumstance.
9 "A capital sentencing scheme must, in short, provide a meaningful basis for
10 distinguishing the few cases in which [the death penalty] is imposed from the many
11 cases which it is not." *Gregg v. Georgia*, 428 U.S. 153, 189, 96 S Ct. 2909, 2932
12 (1976). *See also Zant v. Stephens*, 462 U.S. 862, 877-78, 103 S Ct. 2733, 2642-43
13 (1983) (aggravating factors must narrow the class of persons eligible for the death
14 penalty and reasonably justify imposition of a more severe sentence compared to others
15 found guilty of murder). As Arizona courts have repeatedly recognized, the death
16 penalty should not be imposed in every capital murder case but, rather, it should be
17 reserved for cases in which either the manner of the commission of the offense or the
18 background of the defendant places the crime "above the norm of first-degree murders."
19 *State v. Hoskins*, 199 Ariz. 127, 163 ¶ 169, 14 P.3d 997, 1033 ¶ 169 (2000) (dissent)
20 (quoting *State v. Blazak*, 131 Ariz. 598, 604, 643 P.2d 694, 700 (1982)); *State v.*
21 *Zaragoza*, 135 Ariz. 63, 68-69, 659 P.2d 22, 27-28 (1983) ("either the circumstances of
22 the killing are so shocking ... or the background of the murderer sets him apart from the
23 usual first degree murderer."); *see also State v. Smith*, 146 Ariz. 491, 505, 707 P.2d 289,
24 303 (1985).

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27 ¹ Counsel intend to file additional motions on the constitutionality of *Anderson* separately.

1 Under *Anderson*, to support a finding of probable cause for its allegation of
2 “especially depraved,” the state must provide substantial evidence of the defendant’s
3 “mental state and attitude at the time of the offense as reflected by his words and
4 actions.” *Id.* at n.19. The State’s response is that it will offer evidence regarding the
5 infliction of gratuitous violence beyond that necessary to kill and needless mutilation.
6 Apparently, the evidence for this is the allegation that Ms. Kennedy suffered several
7 blows with a linear object which resulted in nine scalp lacerations and multiple skull
8 fractures as well as injuries to neck ligaments.

9 Counsel do not dispute the violence nature of Ms. Kennedy’s death. Counsel do
10 dispute that the facts alleged by the State rise to the level of that required to support a
11 probable cause finding of *especially* depraved. The *Anderson* court rejected a gratuitous
12 violence finding where the victims “were subjected to prolonged and varied attacks
13 before they succumbed. [One victim] had his throat slashed, a knife pounded into his
14 ear, and his head beaten with a rock. [Another victim] was shot through the jaw, hit
15 over the head with a rifle butt and a lantern, and then killed by blows to the head from a
16 cinder block.” *Id.* at 355, 111 P.3d 397. The court held that this was not violence
17 “beyond that necessary to kill” and insufficient to support an aggravator based on
18 gratuitous violence. The *Anderson* court also held that the conduct did not qualify as
19 mutilation. To establish mutilation, the State must prove mutilation beyond the injuries
20 inflicted by the actual killings. *See State v. Medina*, 193 Ariz. 504, 514 ¶ 38, 975 P.2d
21 94, 104 ¶ 38 (1999) (stating that mutilation involves “distinct acts, apart from the killing
22 itself” committed with the separate purpose to mutilate the victim's corpse).

23 The Arizona Supreme Court has rejected other, more violent murders as
24 establishing gratuitous violence. In *State v. Cañez*, 202 Ariz. 133, 42 P.3d 564 (2002),
25 the victim was partially strangled, stabbed six times, and subjected to twenty-one blunt
26 force injuries, ten of them to the head. *Id.* at 161 ¶ 106, 42 P.3d at 592 ¶ 106. The court

1 To support a finding of probable cause that the offense was committed in an
2 “especially cruel” manner the State must provide substantial evidence of the victim’s
3 mental state. “Cruelty requires proof that the victim ‘consciously experienced physical
4 or mental pain prior to death and the defendant knew or should have known that
5 suffering would occur.’” *State v. Newell*, 212 Ariz. 389, 406, 132 P.3d 833, 850 (2006)
6 citing *State v. Trostle*, 191 Ariz. at 18, 951 P.2d at 883.

7 The Arizona Supreme Court has defined cruel as “disposed to inflict pain
8 especially in a wanton, insensate or vindictive manner: sadistic.” *State v. Gretzler*, 135
9 Ariz. 42, 51, 659 P.2d 1, 10 citing *State v. Knapp*, 114 Ariz. 531, 543, 562 P.2d 704,
10 716 (1977), *cert. denied*, 435 U.S. 908, 98 S.Ct. 1453 (1978). The *Gretzler* court also
11 provided two examples of murders which were especially cruel because they caused
12 physical suffering, *Knapp* and *Mata*. *Id.* (citing *State v. Knapp*, 114 Ariz. at 543, 562
13 P.2d at 716; *State v. Mata*, 125 Ariz. 233, 609 P.2d 48, *cert. denied*, 449 U.S. 938, 101
14 S.Ct. 338). In *Knapp*, the defendant “burned to death his two infant daughters,” and in
15 *Mata*, “the killers performed successive rapes and severe beatings on the victim prior to
16 murdering her.” *Gretzler*, 135 Ariz. at 51, 659 P.2d at 10.

17 In *Gretzler*, however, the court also indicated that all murders are not especially
18 cruel by citing to *Ortiz*, *Bishop*, *Clark*, and *Ceja* as cases in which “there [was] no
19 evidence that the victims actually suffered physical or mental pain prior to death, or ...
20 the evidence presented [was] inconclusive....” *Id.* (citing *State v. Ortiz*, 131 Ariz. 195,
21 210, 639 P.2d 1020, 1035 (1981), *cert. denied*, 456 U.S. 984, 102 S.Ct. 2259 (1982);
22 *State v. Bishop*, 127 Ariz. 531, 534, 622 P.2d 478, 481 (1981); *State v. Clark*, 126 Ariz.
23 428, 436, 616 P.2d 888, 896, *cert. denied*, 449 U.S. 1067, 101 S.Ct. 796 (1980); *State v.*
24 *Ceja*, 126 Ariz. 35, 39, 612 P.2d 491, 495 (1980)).

25 In *Ortiz*, the court held physical suffering was not proven beyond a reasonable
26 doubt because, although the defendant stabbed his victim multiple times and burned her
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1 body, the pathologist could not determine whether the victim was alive when she was
2 burned. 131 Ariz. at 199, 210, 639 P.2d at 1024, 1035, overruled on other grounds, *State*
3 *v. Gretzler*, 135 Ariz.42, 659 P.2d 1 (1983). In *Bishop*, the court held (f)(6) cruelty had
4 not been established where the victim was killed with multiple blows from a claw
5 hammer and the medical expert testified that the victim was unconscious of pain
6 “immediately after the blows to the head.” 127 Ariz. at 534, 622 P.2d at 481. In *Clark*,
7 the court held a cruelty finding to be inappropriate because “[t]he fatal wounds appear
8 to have been delivered at vital parts of the bodies of the victims, and death ensued
9 swiftly.” 126 Ariz. at 436, 616 P.2d at 896. Finally, in *Ceja*, where the defendant shot
10 two victims several times, the court held “that the evidence [was] inconclusive as to
11 whether the victims suffered in such a way as to support a finding that the crime was
12 committed in a cruel manner.” 126 Ariz. at 39, 612 P.2d at 495.

13 The State’s reply indicates that its evidence of cruelty is that Ms. Kennedy
14 suddenly said “Oh no” and the call disconnected. The State alleges in its Reply that this
15 is sufficient proof that she knew an attack was forthcoming and her purported
16 “defensive wounds” indicate she was “conscious, aware, and alert at the time of the
17 attack.” Other than the State’s assertion of this fact, counsel has seen no disclosure or
18 conclusion from any expert indicating which of the several blows were fatal to Ms.
19 Kennedy. Even if the State does have evidence to support these assertions, they do not
20 rise to the level of probable cause required to demonstrate both that Ms. Kennedy
21 consciously experienced physical or mental pain prior to death *and* that Mr. DeMocker
22 knew or should have known that suffering would occur. The State does not have
23 evidence sufficient to support a finding of probable cause on the cruelty prong of the
24 (f)(6) aggravator and it should therefore be dismissed.

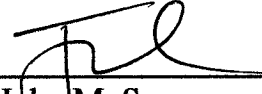
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CONCLUSION

For these reasons, Mr. DeMocker requests that this Court strike the (f) (6) aggravator based on the State's failure to demonstrate probable cause. In the alternative Mr. DeMocker requests that the Court prohibit the State from offering any evidence or argument to the jury that the offense was committed in a heinous manner and, in the event that an aggravation phase is held, that the jury make separate findings as to each of the two prongs the State is alleging under (f) (6).

DATED this 16th day of October, 2009.

By: _____


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ORIGINAL of the foregoing mailed for filing
this 16th day of October, 2009, with:

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COPIES of the foregoing mailed
this 16th day of October, 2009, to:

The Hon. Thomas B. Lindberg
Judge of the Superior Court
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